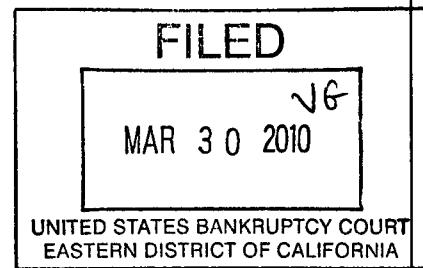


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NOT FOR PUBLICATION

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF CALIFORNIA
FRESNO DIVISION

**MEMORANDUM DECISION REGARDING DEFENDANT'S
MOTION FOR SUMMARY JUDGMENT**

21 This disposition is not appropriate for publication. Although it may cited for
22 whatever persuasive value it may have (see Fed. R. App. P. 32.1), it has no
precedential value. See 9th Cir. BAP Rule 8013-1.

23
24 Jeffrey J. Lodge, Esq., appeared on behalf of the defendant, United States of
America, Department of Housing and Urban Development.

25 Plaintiff, George R. Cleaver appeared *in propria persona*.

26 Before the court is a motion for summary judgment (the “Motion”)
27 brought by defendant United States of America, Department of Housing and
28 Urban Development (“HUD”). HUD is a secured creditor of the debtors

1 George and Cindy Cleaver (the “Cleavers”) and holds two liens against the
 2 Cleavers’ home. After the Cleavers completed performance of their chapter
 3 plan, and the chapter 13 trustee filed his final report (the “TFR”), the
 4 Cleavers brought this adversary proceeding against HUD entitled “Complaint
 5 to Enforce Chapter 13 Plan, for Declaratory and Injunctive Relief and
 6 Damages and an Accounting.”¹ The court held a hearing on the Motion and
 7 took the matter under submission. Because the court cannot find that there are
 8 any triable issues of material fact, and because HUD has established its right to
 9 a judgment on all claims for relief as a matter of law, the Motion will be
 10 granted.

11 This memorandum decision contains the court’s findings of fact and
 12 conclusions of law required by Federal Rule of Civil Procedure 52(a), made
 13 applicable to this adversary proceeding by Federal Rule of Bankruptcy
 14 Procedure 7052. The bankruptcy court has jurisdiction over this matter
 15 pursuant to 28 U.S.C. § 1334 and 11 U.S.C. § 523² and General Orders 182
 16 and 330 of the U.S. District Court for the Eastern District of California. This
 17 is a core proceeding pursuant to 28 U.S.C. § 157(b)(2).

18 //
 19

20 ¹This bankruptcy was filed in June 2003. The Cleavers have completed their chapter
 21 13 plan, the TFR has been filed and approved, and the Cleavers have received their chapter
 22 13 discharge. The Cleavers initially objected to the TFR on the grounds, *inter alia*, that they
 23 did not have an accurate accounting from HUD. The court overruled that objection and
 24 instructed the Cleavers to file this adversary proceeding. The TFR showed that the
 25 prepetition arrearage on the HUD Loan had been paid in full. HUD did not object to the
 26 TFR. This case appears to be ready to close once this adversary proceeding is concluded.

27 ²Unless otherwise indicated, all chapter, section and rule references are to the
 28 Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy
 Procedure, Rules 1001-9036, as enacted and promulgated *before* October 17, 2005, the
 effective date of The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005,
 Pub. L. 109-8, Apr. 20, 2005, 119 Stat. 23.

1 **Background and Findings of Fact.**

2 The court has reviewed and considered the entire record in this case, the
 3 pleadings and admissible evidence filed in support of and in opposition to the
 4 Motion, and the arguments of the parties on both sides. Based on the evidence
 5 presented, the following facts appear to be undisputed.

6 HUD was a secured creditor in the Cleavers' chapter 13 bankruptcy by
 7 virtue of a mortgage loan made to the Cleavers in 1982 (the "HUD Loan").
 8 The HUD Loan was documented and secured in two parts; a conventional loan
 9 secured by a first deed of trust against the Cleavers' residence (the
 10 "Residence") in the original amount of \$47,500, and a deferred loan secured
 11 by a second deed of trust, also against the Residence.³

12 When the Cleavers filed this bankruptcy in 2003, they had missed
 13 approximately five years of payments on the HUD Loan. The Cleavers
 14 confirmed a chapter 13 plan (the "Plan") pursuant to which they committed to
 15 pay the arrearage on the HUD Loan estimated in the Plan to be \$28,000,
 16 without interest. HUD did not object to confirmation of the Plan, specifically
 17 the portion of the Plan which provided for 0% interest on its arrearage claim.
 18 Pursuant to the Plan, the Cleavers were required to make the post-petition
 19 mortgage payments according to the terms of the loan documents directly to
 20 HUD.

21 Now that the Cleavers have completed their Plan, there is a dispute with
 22 HUD over the balance due on the HUD Loan. In July 2003, HUD filed a
 23 proof of claim in the bankruptcy case stating a "payoff amount" of \$61,659.19,

24
 25 ³The deferred loan does not become due and payable unless and until the Cleavers
 26 sell and convey title to their Residence or rent the Residence to a third party for longer than
 27 one year. The balance due on the deferred portion of the HUD Loan is not currently in
 28 dispute and is not before the court in this adversary proceeding. All references herein to the
 29 "HUD Loan" relate only to the conventional portion of the HUD Loan secured by the first
 30 trust deed.

1 including an arrearage of \$36,228.57. Interest accrued on the HUD Loan at
 2 the rate of 8.25% per annum.

3 After the Plan was confirmed, the Cleavers objected to HUD's proof of
 4 claim on the grounds, *inter alia*, that the claim included unauthorized service
 5 charges and inappropriate escrow charges, and failed to properly account for
 6 the payment history⁴ (the "Claim Objection"). The Claim Objection included a
 7 list of payments which the Cleavers contend they made on the HUD Loan
 8 from January 1997 to May 1999. That accounting confirmed that no payments
 9 were made for 57 months between October 1998 and June 2003.

10 In response to the Claim Objection, HUD admitted that some of the
 11 statements it had provided to the Cleavers were incorrect.⁵ In May 2004, HUD
 12 filed a response which included a history of the Cleaver's dispute with HUD
 13 and a statement of HUD's position regarding the balance due on the HUD
 14 Loan. HUD's response included copies of the loan documentation and
 15 correspondence with the Cleavers. The court held a status conference on the
 16 Claim Objection on October 13, 2004. At that hearing, the Cleavers' attorney
 17 informed the court that the parties had reached a settlement of the Claim
 18 Objection and the status conference was dropped from calendar. The parties
 19 never submitted a stipulation to memorialize their agreement, or an order to fix
 20 the balance due and resolve the dispute. However, HUD did file an amended
 21 proof of claim in November 2004.

22 HUD's amended proof of claim included a statement of account dated
 23 October 29, 2004. It showed a "total payoff amount" as of the petition date in
 24

25 ⁴The Claim Objection was filed as an objection to a proof of claim filed by First
 26 Madison Services, Inc. The proof of claim shows HUD to be the creditor and First Madison
 27 to be the servicing agent.

28 ⁵See Order Setting Contested Matter For Further Status Conference filed on June 14,
 2004.

1 the amount of \$76,027.78. This included an unpaid principal balance of
 2 \$45,671.92 and an arrearage “total to bring current” as of the petition date in
 3 the amount of \$30,467.92 (the “Amended HUD Claim”).⁶ The Cleavers did
 4 not object to the Amended HUD Claim and proceeded to pay the stated
 5 arrearage through the Plan. The Cleavers made all of the payments due under
 6 the Plan and the arrearage portion of the HUD Loan was paid in full without
 7 interest. The Cleavers also made monthly mortgage payments directly to HUD
 8 in the average amount of \$408.15. However, HUD contends that those
 9 payments were approximately \$86 per month less than the amount required to
 10 cover the principal, interest, service charges, and the impound account for
 11 property taxes.

12 In February 2008, after the Cleavers completed their Plan payments,
 13 their bankruptcy counsel sent a demand to HUD for a beneficiary statement
 14 pursuant to Cal.Civ.Code § 2943. HUD did not respond to the demand within
 15 21 days as prescribed in § 2943(b). In April 2008, HUD filed a pleading with
 16 the court which stated that the outstanding balance due on the HUD Loan, as
 17 of April 15, 2008, was \$28,088.33 (“HUD’s First Accounting”). Attached to
 18 HUD’s First Accounting was a payment record showing all payments received
 19 from both the Cleavers and the chapter 13 trustee after December 14, 2004.
 20 HUD also reported that the Cleavers were current on their post-petition
 21 mortgage payments. The Cleavers objected to HUD’s First Accounting. HUD
 22 reviewed its First Accounting and realized it had mistakenly applied the
 23 arrearage payments from the chapter 13 trustee to the principal portion of the
 24 HUD Loan, thus grossly understating the balance due.

25 In June 2008, HUD filed another pleading entitled “HUD’s Amended
 26

27 ⁶The deferred portion of the HUD Loan was referenced in the Amended HUD Claim,
 28 but no amount was stated because the deferred obligation was not yet due and payable.

1 Accounting of Chapter 13 Payments" ("HUD's Amended Accounting").
 2 HUD's Amended Accounting reported that the balance due on the HUD Loan,
 3 after properly crediting all payments received from the chapter 13 trustee, was
 4 \$41,639.93. In the Amended Accounting, HUD also asserted a right to collect
 5 accrued interest on the arrearage portion of its claim in the amount of
 6 \$6,872.49, and accrued attorney fees and costs in the amount of \$7,613.94.
 7 Adding these together, HUD reported a balance due as of January 1, 2008, in
 8 the total amount of \$56,126.36.⁷

9 The Cleavers responded to HUD's Amended Accounting by filing this
 10 adversary proceeding for, *inter alia*, an accounting of the balance due,
 11 injunctive relief, and damages. In the intervening time between the filing of
 12 the complaint and the hearing on this Motion, the parties have engaged in the
 13 bankruptcy dispute resolution process and HUD has provided a supplemental
 14 accounting to the Cleavers. HUD has also withdrawn its demand for attorney
 15 fees and interest on the arrearage claim. After the dispute resolution process,
 16 HUD agreed to, and did, reduce the principal balance due as of January 1,
 17 2008, from \$41,639.93 to \$38,646.63. (Declaration of Mikel K. Anderson ¶6.)
 18 The record is silent as to what additional adjustments HUD made to its
 19 Amended Accounting to arrive at the lower number.⁸ Unfortunately, the
 20 parties were unable to come to an agreement to fix the amount due on the
 21 HUD Loan going forward.⁹

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⁷HUD's Amended Accounting erroneously stated the total to be \$55,486.43.

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⁸The reasons for this reduction are not stated. It is not clear whether this was the result of further adjustments to HUD's Amended Accounting, or a concession by HUD made in an effort to reach a final resolution of the dispute.

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⁹Subsequently the Cleaver's bankruptcy counsel withdrew and the Cleavers are now proceeding *pro se*.

1 **Issues Presented.**

2 The Cleavers allege five claims for relief in the adversary proceeding;
3 (1) for a determination that HUD's demand for attorney fees and interest on
4 the mortgage arrearage paid through the Plan is inconsistent with and violates
5 the Plan and the order confirming the Plan; (2) for a determination that HUD is
6 barred by the Plan from collecting the interest and attorney fees; (3) for an
7 injunction barring HUD from such actions; (4) for an award of damages for
8 violation of Cal.Civ.Code § 2943, based on HUD's failure to timely prepare
9 and deliver a beneficiary statement; and (5) for a final accounting of the
10 balance now due on the HUD Loan. In response to the complaint, HUD
11 brought this Motion for Summary Judgment or Summary Adjudication. HUD
12 asks the court to confirm the outstanding balance due on the HUD Loan.
13 HUD has offered into evidence an amortization table based on its accounting
14 as to the declining balance due each month beginning January 1, 2008,
15 assuming regular mortgage payments are made. (See HUD's exhibit 7.) At
16 the hearing in October 2009, HUD acknowledged that the balance then due on
17 the HUD Loan was actually less than shown in exhibit 7 based on recent
18 payments.¹⁰ HUD contends that there are no disputed issues of material fact as
19 to the accuracy of that accounting.

20 **Applicable Law.**

21 **1. Summary Judgment Standard.** Summary judgment is appropriate,
22 "if the pleadings, depositions, answers to interrogatories, and admissions on
23 file, together with the affidavits, if any, show that there is no genuine issue as
24 to any material fact and that the moving party is entitled to a judgment as a

25
26 ¹⁰The amortization table showed a balance due as of October 1, 2009, in the amount
27 of \$37,299.31. HUD represented that the correct balance was \$37,013.41 as of October 21,
28 2009.

1 matter of law. A summary judgment, interlocutory in character, may be
2 rendered on the issue of liability alone, although there is a genuine issue as to
3 the amount of damages.” Fed. R. Civ. P. 56(c), (made applicable in this
4 adversary proceeding by Fed. R. Bankr. P. 7056).

5 A material fact is one that might affect the outcome of the suit under
6 the governing law and irrelevant or unnecessary factual disputes will not be
7 considered in a motion for summary judgment. *Anderson, et al. v. Liberty*
8 *Lobby, Inc., et al.*, 477 U.S. 242, 248, 106 S.Ct. 2505 (1986).

9 The moving party bears the burden of showing that there is no genuine
10 dispute as to each issue of material fact. *Celotex Corporation v. Catrett*, 477
11 U.S. 317, 325, 106 S.Ct. 2548, 2554 (1986). However, the party adverse to a
12 motion for summary judgment cannot simply deny the pleadings of the
13 movant; the adverse party must designate “specific facts showing that there is
14 a genuine issue for trial.” Fed.R.Civ.P. 56(e). More precisely, “[i]t is not
15 enough that the nonmoving party point to disputed facts; rather, they must
16 make a sufficient showing to establish the existence of a triable issue of
17 material fact as to an element essential to the moving party’s case.” *In re*
18 *Powerburst Corporation*, 154 B.R. 307, 309-310 (Bankr.E.D.Cal. 1993),
19 citing *Lake Nacimiento Ranch v. San Luis Obispo County*, 830 F.2d 977, 979-
20 980 (9th Cir.1987), cert. denied 488 U.S. 827, 109 S.Ct. 79, 102 L.Ed.2d 55
21 (1988).

22 The parties may use summary judgment to dispose of all or any part
23 thereof the opponent’s claim or cross claim. Fed.R.Civ.P. 56(a) & (b). The
24 court may *sua sponte* grant summary judgment in favor of a nonmoving party
25 as long as the moving party was provided a “full and fair opportunity to
26 ventilate the issues in the motion.” *United States v. Real Property Located at*
27 *25445 via Dona Christa, Valencia California*, 138 F.3d 403, 407, n.4 (9th Cir.
28

1 1998), citing *Cool Fuel, Inc. v. Connett*, 685 F.2d 309, 311 (9th Cir. 1982).
2 The filing of a formal cross-motion is not necessary. *Local 453, International*
3 *Union of Electrical, Radio & Machine Workers, AFL-CIO v. Otis Elevator*
4 *Company*, 314 F.2d 25, 27 (2d Cir. 1963).

5 **Analysis.**

6 **The First Three Claims for Relief.** In their first three claims for
7 relief, the Cleavers seek a determination: (1) that HUD's demand for attorney
8 fees and interest on the arrearage portion of the HUD Loan is inconsistent with
9 and violates the Plan and the order confirming the Plan; (2) that HUD should
10 be barred by the Plan from collecting interest and attorney fees; and (3) for an
11 injunction barring HUD from such violations and collections. At the hearing
12 on this Motion, HUD agreed to withdraw its demand for attorney fees and
13 accrued interest. HUD acknowledged that the arrearage portion of its claim
14 has been paid in full through the Plan. Accordingly, the first three claims for
15 relief appear to be moot and will be dismissed.

16 **The Fifth Claim for Relief.** In the fifth claim for relief, the Cleavers
17 request an accounting of the balance due on the HUD Loan. In support of the
18 Motion, HUD has produced an amortization table (exhibit 7) showing the
19 declining balance due after the regular payments are made each month
20 beginning January 1, 2008. The initial balance in that amortization table is
21 less than the balance reflected in HUD's Amended Accounting filed in
22 November 2008. HUD contends that the numbers on this document are
23 consistent with corrections it has made to the accounting and with negotiations
24 between the parties after commencement of this adversary proceeding. The
25 Cleavers did not object to the admissibility of HUD's accounting. At the
26 hearing on the Motion, HUD's counsel acknowledged that the Cleavers were
27 current in their on-going payments and that the amount due as of October 1,
28

1 2009, was \$37,013.41, slightly less than the amount shown for that date in the
2 amortization table based on payments that had been made. HUD represented
3 that the monthly payment on the conventional portion of the HUD Loan is
4 \$396.31 and the escrow payment is \$66.74.

5 The Cleavers dispute HUD's accounting. They do not specifically
6 contest any of the numbers in HUD's amortization table, but contend that the
7 accounting is incomplete because it does not start from the beginning of the
8 HUD Loan in 1982. If the Cleavers disagree with HUD's accounting, then
9 they had the burden of producing an accounting of their own to show what
10 they have paid and what they contend is now due. If they want a more detailed
11 accounting from HUD, then they had a burden to produce evidence to show
12 that HUD's numbers are wrong. They have not offered any specific
13 information to show how or where HUD's accounting is incorrect. They have
14 not shown that there are disputed issues of material fact that would require a
15 trial and the production of further evidence in this adversary proceeding. In
16 response to this Motion, the Cleavers did submit a typed, but unauthenticated
17 list of payments that they contend was made from November 2007 through
18 October 2009, however they do not indicate the significance of the list with
19 regard to HUD's accounting. The Cleavers also submitted an unauthenticated
20 letter from Jackie Tate, Escrow Administration, C&L Service Corporation,
21 dated January 7, 2009, reflecting an overage in their escrow account, the
22 amount of their estimated annual taxes, and their monthly escrow amount for
23 taxes, but they do not explain the significance of the letter in the context of this
24 Motion.

25 After listening to the parties in court on multiple occasions, and
26 reviewing the various correspondence and declarations regarding the long and
27 continuous history of this dispute, the court fully appreciates the depth and
28

1 sincerity of the Cleavers' disappointment with the accounting now offered into
 2 evidence by HUD. But this dispute cries for some finality. The Cleavers
 3 continue to make their mortgage payments to HUD. Both parties need a final
 4 determination of the amounts due on the HUD Loan each month going
 5 forward. HUD has offered into evidence an amortization table that sets forth
 6 that information. The court has nothing else upon which to base its ruling.

7 **The Fourth Claim for Relief: Cal.Civ.Code § 2943.** The only
 8 remaining issue is the Cleavers' fourth claim for relief. The Cleavers request
 9 damages pursuant to Cal.Civ.Code § 2943(e)(4), which provides for a statutory
 10 penalty if a mortgage creditor "willfully" fails to produce a beneficiary
 11 statement and payoff demand within 21 days after the receipt of a written
 12 demand.¹¹ The term "willfully" is defined in § 2943(e)(4) to mean "intentional
 13 failure to comply with the requirements of this section without just cause or
 14 excuse."

15 With this Motion, HUD has offered evidence to support its contention
 16 that any failure on its part was not "willful" but was the result of difficulties
 17
 18

19 ¹¹Cal.Civ.Code § 2943(e)(4) states: If a beneficiary for a period of 21 days after
 20 receipt of the written demand willfully fails to prepare and deliver the statement, he or she is
 21 liable to the entitled person for all damages which he or she may sustain by reason of the
 22 refusal and, whether or not actual damages are sustained, he or she shall forfeit to the
 23 entitled person the sum of three hundred dollars (\$300). Each failure to prepare and deliver
 24 the statement, occurring at a time when, pursuant to this section, the beneficiary is required
 25 to prepare and deliver the statement, creates a separate cause of action, but a judgment
 26 awarding an entitled person a forfeiture, or damages and forfeiture, for any failure to prepare
 27 and deliver a statement bars recovery of damages and forfeiture for any other failure to
 28 prepare and deliver a statement, with respect to the same obligation, in compliance with a
 demand therefor made within six months before or after the demand as to which the award
 was made. *For the purposes of this subdivision, "willfully" means an intentional failure to
 comply with the requirements of this section without just cause or excuse.* (Emphasis
 added.)

1 such as changes within the program and computer problems.¹² HUD's
 2 evidence, a declaration under penalty of perjury by its chief counsel, states that
 3 accounting issues with the Cleavers' payment history (no payments for the five
 4 years preceding the bankruptcy), and the fact that HUD required the assistance
 5 of their bankruptcy counsel in responding to the demand, caused the delay in
 6 HUD's ability to produce the beneficiary statement within the statutory time
 7 period. (Declaration of Mikel K. Anderson, p.3, ¶5, filed Sept. 23, 2009.)
 8 That evidence supports a finding that HUD did not act "intentionally and
 9 without just cause." The Cleavers have not produced any evidence to support
 10 a finding otherwise. Accordingly, HUD is entitled to judgment on the
 11 damages issue as a matter of law.¹³

12 **Conclusion.**

13 Based on the foregoing, the court finds and concludes that there are no
 14 triable issues of material fact and that HUD is entitled to judgment on all
 15 claims for relief as a matter of law. HUD is entitled to a judgment fixing the
 16 balance due on the conventional portion of the HUD Loan secured by the first
 17 deed of trust, according to the accounting and amortization table provided by
 18 HUD in support of this Motion, as adjusted by HUD's counsel at the hearing.
 19 HUD is also entitled to a judgment as a matter of law on the Cleavers' fifth
 20 claim for relief for damages. HUD's failure to provide the beneficiary

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 22
 23 ¹²HUD is an agency of the Federal government. HUD also contends that the federal
 24 regulations which govern HUD's operations pre-empt the state's Civil Code. The court is
 25 not deciding here whether HUD is bound by § 2943. The court is only finding that HUD did
 26 not violate § 2943 in a manner that would put that question at issue.

27
 28 ¹³In response to the Motion, the Cleavers also contend that they are entitled to
 damages for, *inter alia*, (1) the cost of having to file the bankruptcy case; and (2) lost work
 and time associated with prosecuting their dispute with HUD. Those issues are not pled in
 the adversary proceeding and are not properly before the court.

1 statement and payoff demand within 21 days was not "willful" within the
2 meaning of Cal.Civ.Code § 2943(e)(4). The Cleavers' first, second, and third
3 claims for relief are moot and will be dismissed. HUD shall submit a
4 proposed judgment consistent herewith. All parties shall bear their own
5 attorney fees and costs for this litigation.

6 Dated: March 30, 2010



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10 W. Richard Lee
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12 United States Bankruptcy Judge
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